1984

Rebecca Sims Lord v. David George Lord : Respondent's Reply Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

REBECCA SIMS LORD,	)	
Plaintiff-Respondent,	)	
vs.	)	Case No. 19167
DAVID GEORGE LORD,	)	
Defendant-Appellant.	)	

RESPONDENT'S REPLY BRIEF

Appeal and Cross-Appeal from Judgment of Fifth Judicial District Court of Washington County, State of Utah, the Honorable J. Harlan Burns, District Judge.

THOMPSON, HUGHES & REBER
Michael D. Hughes
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Attorney for Appellant

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KEY TO ABBREVIATIONS

AB - Appellant's Brief
RB - Respondent's Brief
ARB - Appellant's Reply Brief
I - Volume I of the Record
II - Volume II of the Record

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF UTAH

REBECCA SIMS LORD,	)	
Plaintiff-Respondent,	)	
vs.	)	No. 19167
DAVID GEORGE LORD,	)	
Defendant-Appellant.	)	

RESPONDENT'S REPLY BRIEF

POINT I

APPELLANT CANNOT CHALLENGE THE VALIDITY OF JUDGE JONES' SANCTION FOR THE FIRST TIME IN HIS REPLY BRIEF

On page 1 of his reply brief, Appellant now contends that one of the key issues for this Court to consider is a series of findings and a sanction, pursuant to Rule 37, U.R.C.P., entered by Judge Maurice D. Jones in March of 1982. (Appellant's Reply Brief, hereinafter ARB at 1; cf. Record, Volume I, hereinafter I, at 158-59) Neither Appellant's notice of appeal nor his brief on appeal, however, even mentioned this order. (See Record, Volume II, hereinafter II at 178; Appellant's Brief). Thus, Appellant's notice of appeal filed pursuant to Rule 73A, U.R.C.P., makes no mention of anything but the Supplemental Decree and Judgment Pertaining to Distribution of Property, which was entered after nonjury trial on January 19th, 1983

and filed on January 31st, 1983. (See II at 152). And in Appellant's initial brief on appeal no mention was made of Judge Jones' earlier order regarding sanctions. Having failed to raise in his initial brief the validity of this sanction, Appellant has specifically abandoned any objection to it. (See Armstrong Rubber Company v. Bastian, 667 P.2d 1346 (Utah 1983). While Appellant choses to raise the issue of the order's validity in his reply brief, the Respondent choses to simply note to the Court that this issue has been waived, and the only real point of argument might be the EFFECT of Judge Jones' order, BUT NOT ITS VALIDITY. While Appellant now states that the inequity of the sanction is a key issue for the Court to consider, he has failed to either procedurally or substantively imbue the Court with any real authority to review the validity of this sanction.

POINT II

APPELLANT'S REPLY BRIEF BOLDLY CREATES A FACTUAL SITUATION WITHOUT CITATION TO THE RECORD OR SUPPORT IN THE EVIDENCE

The Appellant laboriously seeks to have this Court find the trial proceedings "inequitable" and the equities of Title 30 of the Utah Code to "have been sorely violated" by the district court judges who heard this case over a period of two and one-half years at the lower level. (ARB at 1-2) Appellant states that his nonappearance at trial was because in filing a notice of appeal from an interlocutory order, he incorrectly felt that the trial proceedings were stayed. (ARB at 2) Appellant once again states that he had a right

to appeal, but indeed, Appellant's counsel, in his second attempt to appeal an interlocutory matter, filed a notice as if the order denying venue were final in nature. (See Respondent's Brief, hereinafter RB at 30-31). It had long been settled under Utah law that there is no right of direct appeal in this jurisdiction from an order granting or refusing a change of venue. (See Hale v. Barker, 70 Utah 284, 259 P. 928 (1927); see also II, document immediately preceding R-178). Consequently, the notice of appeal from the interlocutory order had no effect on the trial court's continuing jurisdiction to hear the matter. (See RB at Point VII). Appellant could have petitioned this Court for a discretionary review under Rule 72(b), U.R.C.P. He failed to do so!

Appellant further claims that an nonparty witness, Mr. Anthony Thurber, misled his counsel as to Mr. Thurber's intent to attend trial. Mr. Thurber was under subpoena. In arguing this matter, Appellant attempts to bring before the Court extraneous, self-serving affidavits alleging that Mr. Thurber advised him that he was not attending trial. Mr. Thurber has previously filed with this Court contrary affidavits attached to the Respondent's brief. Furthermore, attached to this reply brief is the affidavit of Carolyn Lockett, who, under oath, has stated that she distinctly heard Mr. Thurber advise Mr. Stanton that he would be attending trial at least three times on January 18th, 1983. Mr. Thurber, again, was under subpoena, and there is no

reason to believe that he would have disobeyed the same. Respondent's counsel always understood Mr. Thurber was obeying the subpoena, and was never advised by Appellant's counsel that neither he nor the Appellant would attend trial.

POINT III

RHETORICAL ALLEGATIONS AND QUESTIONS PHRASED TO THE COURT WITHOUT CITATION TO THE RECORD NOR ANY EVIDENTIARY BASIS PRECLUDE ANY APPELLATE REVIEW

Appellant's reply brief creates a version of "the facts" without any support in the record, and certainly without any support in a trial transcript which is not part of the record on appeal. In this ambient, the Utah Supreme Court must logically assume the correctness of the trial court's judgment, absent appropriate citation to the record and a transcript of trial which would invite reversal. (See, e.g., State v. Stegel, 660 P.2d 252 (Utah 1983). While the Stegel decision pertains particularly to Rule 75(p)(2)(2)(d), U.R.C.P., the thrust of the decision is that allegations of fact should contain citation to the pages in the record where they are appropriately supported. In Appellant's reply brief, once again he creates a self-serving statement of facts to invite judicial review without citation to the record. Exemplary of Appellant's technique is the following excerpt from page 3 of his reply brief:

> Anthony Thurber's testimony as to notarizing the Quit Claim Deed for friends is contrary to fact. Anthony Thurber acted in the capacity of

Attorney for Defendant in the matter of pre-divorce property settlement and initially represented Defendant in this divorce matter. Mr. Thurber's testimony is one of vindictiveness and conspiracy and can so be proven on remand.

According to the record and Plaintiff's brief, the trial held on January 19, 1983 was solely for the purpose of martial property division. The divorce had been granted in a previous trial on May 28, 1982. The Defendant was granted a divorce from the Plaintiff on the grounds of adultry [sic] and the Plaintiff was granted a divorce from the Defendant on the grounds of Mental Cruelty. Plaintiff was five (5) months pregnant at the time of the Divorce Trial. The Court may also want to note that Plaintiff and her paramour were married on the afternoon of May 28, 1982.

It is apparent by the record that Plaintiff's counsel and witness, Anthony Thurber embarked upon an assassination of the Defendant at the January 19, 1983 trial. Why else would Plaintiff's exhibits P-8 through P-21 be sealed by the Court.

Domestic matters are equitable in and where the evidence at the Trial Court clearly preponderates against the Findings of Facts, the Supreme Court can reverse those findings.

How can the Trial Court find that Defendant's business generates $35,000.00 annually without Defendant's business records? The Plaintiff was certainly not competent to testify. Defendant and Plaintiff had been separated for a period of fifteen months at the time of trial and had been separated on ten pervious [sic] occasions. Plaintiff's brief states that she was employed full time from the start of the marriage outside of Defendant's business.

How can a Trial Court find that Plaintiff is entitled to attorney's fees when she is carrying another man's child and had granted the Defendant a divorce on the grounds of adultry [sic]? In fact, Plaintiff's counsel told Defendant's counsel that he was not going to get a penny for his fees unless he was able to get the marital home for the Plaintiff. See copy of letter attached hereto as Annex "B" and incorporated herein by reference.

In response to the above, Mr. Thurber's testimony is not before this Court, because Appellant chose not to have a transcript of the same made available. Appellant

notes that he filed a certificate that the transcript had been ordered, but in point of fact Mr. Byron Ray Christiansen, the certified shorthand reporter at the trial, has never been contacted by Mr. Stanton, by Mr. Stanton's secretary, by Mr. Stanton's paralegal, or by anybody representing or acting on behalf of Mr. Lord or Mr. Stanton to make a transcript of the trial in this case! An affidavit of Mr. Christiansen indicating that no transcript was ever ordered by him is attached to this brief. Indeed, it is the Appellant's not the Respondent's duty to assure that a trial transcript is made available to the appellate tribunal. (See Rule 75(b) U.R.C.P.). In the instant case, Appellant's counsel filed a certificate with the court, pursuant to Rule 75(a)(1) U.R.C.P. indicating that he had ordered a transcript from the court reporter. This certificate is attached to Appellant's reply brief, but the certificate flies in the face of the following two facts: (1) Mr. Byron Ray Christiansen, court reporter, was indeed not contacted by anyone in reference to the preparation of a trial transcript for purposes of this appeal, and thus did not prepare one; and (2) there is no trial transcript before this Court, and Appellant has chosen to take his appeal alleging extraneous facts without the benefit of one.

Appellant's statement about the Respondent's remarriage are unknown to Respondent's counsel. They, again, are not part of the record. Respondent is more than happy to have Exhibits P-8 through P-21 received by this

Court, should Appellant so desire. Appellant's reply brief's statement that Respondent has stated she was "employed full time from the start of the marriage outside of Defendant's business" is simply untrue. (See ARB at 3) Indeed, the Respondent's brief states that Respondent worked substantially full-time throughout the term of her marriage, but indicates that whatever remuneration the Respondent received from working within the family business was used to pay household expenses and supply the other temporal needs of the marriage. (See RB at 6; see also II at 145, ¶s 3 and 4). Lastly, Appellant's counsel now makes extraneous allegations pertaining to Respondent's fee agreement with her counsel, and as authority therefor cites Appellant's counsel's own self-serving letter which he appends as an exhibit to his brief. While Respondent's fee agreement has not been put before this Court for appellate review, Respondent's counsel, as an officer of the Court, would gladly certify that he is working on a standard hourly basis.

The trial court clearly had the equitable power to divide up the marital property, including the marital home. To rhetorically ask "how can this be done" is to blindly ignore the thrust of Title 30 of the Utah Code as long-construed by the Supreme Court. A reimbursement of monies advanced to the family business with the award of the remainder of the business to the Appellant does not violate the statute of frauds, as the statute of frauds is not

involved in considering these equitable divisions of jointly held or jointly operated property.

Ultimately, Appellant argues that the entire proceedings bely unfairness to his client, particularly in requiring him to defend a matter three hundred miles from his home. Venue, however, was proper in Washington County, and any objection to venue came over a year and a half after the initial complaint and responsive pleadings were filed in this case.

The Appellant states:

> A court must consider all the pertinent facts without bias, prejudice or disadvantage to one party in making its decision. AB at 5.

The Appellant, however, has chosen to argue on the basis of assertions without foundation in the record and on the basis of innuendo pertaining to the attendance of a nonparty witness. The Appellant seeks a reversal in this case on the basis of purely speculative allegations. He no doubt seeks to argue these allegations as if the same were before this Court. He brings his appeal without a transcript of trial and states that the Respondent's argument that he has never ordered the complete records of the trial proceedings is incorrect, attaching his certificate regarding the transcript as Appendix C to his reply brief. This belies the fact, however, that the court reporter was never contacted in this case regarding a transcript for purposes of appeal, and the appeal, in fact, has been perfected before this Court without the benefit of a trial transcript.

It is simply not part of the record, and absent the trial transcript the Appellant's factual allegations comprise little more than errant pipe dreams of what Appellant wishes the facts might be.

Lastly, Appellant offers no response to Point VIII of Respondent's brief, to-wit, that there has been no timely perfection of an appeal in this case. Thus, to reverse the trial court judgment invites little more than rampant speculation as to the veracity of Appellant's allegations. Indeed, Appellant's invitation to reverse the trial court comes before this Court absent any trial transcript, and, furthermore, absent any proper and timely perfected notice of appeal. As stated in Respondent's brief, the last order of the trial court denying the Appellant's motion to vacate the trial court's judgment is docketed with the district court on March 21st, 1983. (See II at 176) The notice of appeal, however, in the instant case, was not properly docketed until April 25th, 1983. (See II at 178) By reason of Appellant's sheer delay in filing his motion to vacate, the appeal time in the instant case actually ran and expired on February 28th, 1983. (See RB at Point VIII, pp. 65-69) Viewed from any angle, however, the Appellant has failed to perfect an appeal. His cacaphonic rumblings should not now invite either judicial attention or deference.

RESPECTFULLY SUBMITTED this 31st day of August, 1984.

MICHAEL D. HUGHES
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 31st day of August, 1984, I mailed two true and correct copies of the above and foregoing RESPONDENT'S REPLY BRIEF to D. Aron Stanton at 255 East 400 South, Suite 101, Salt Lake City, Utah, 84111, postage prepaid.

A P P E N D I X

IN THE SUPREME COURT OF THE STATE OF UTAH

REBECCA SIMS LORD, Plaintiff-Respondent,	)	AFFIDAVIT OF CAROLYN LOCKETT
vs.	)	
DAVID GEORGE LORD, Defendant-Appellant.	)	No. 19167

STATE OF UTAH)
: ss.
County of Salt Lake)

CAROLYN LOCKETT, being first duly sworn, deposes and says:

1. I am a secretary in the offices of Anthony M. Thurber, attorney in Salt Lake City.

2. I have reviewed the affidavit of Anthony M. Thurber previously filed before this Court and attached hereto as Exhibit A, indicating that Mr. Thurber advised Mr. Stanton that he would be attending trial on the above matter on January 19th, 1983.

3. I have reviewed Mr. Stanton's statement in his brief that on January 18th, 1983, Mr. Thurber advised him that he would not be in attendance at trial the next day.

4. On January 18th, 1983, Mr. Thurber invited me into his office with the express understanding that I was to overhear Mr. Thurber in his conversation with Mr. Stanton.

5. On that day, to-wit, approximately one day prior to trial, Mr. Thurber repeatedly told Mr. Stanton, and in no case less than three times, that he had been subpoenaed to attend trial, and that he would be attending the trial in Washington County, and that Mr. Stanton should settle the case, if at all possible, on the best terms he could, but again, in any event, Mr. Thurber would indeed be attending trial.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 21st day of August, 1984.

CAROLYN LOCKETT

SUBSCRIBED AND SWORN TO before me this 21st day of August, 1984.

JOHN WILLARD CARL NOTARY PUBLIC State of Utah

NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission Expires:

12-15-87

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 1984, I mailed a true and correct copy of the above and foregoing AFFIDAVIT OF CAROLYN LOCKETT to D. Aron

Stanton at 255 East 400 South, Suite 101, Salt Lake City, Utah, 84111, postage prepaid.

SECRETARY

IN THE SUPREME COURT OF THE STATE OF UTAH

REBECCA SIMS LORD, Plaintiff-Respondent,	)	AFFIDAVIT OF BYRON RAY CHRISTIANSEN
vs.	)	
DAVID GEORGE LORD, Defendant-Appellant.	)	No. 19167

STATE OF UTAH)
: ss.
County of Washington)

BYRON RAY CHRISTIANSEN, being first duly sworn, deposes and says:

1. I am a certified shorthand reporter in and for the State of Utah and the official court reporter of the Fifth Judicial District Court comprised of Beaver, Iron and Washington counties, and have been such since June 1, 1960 and at all times therein.

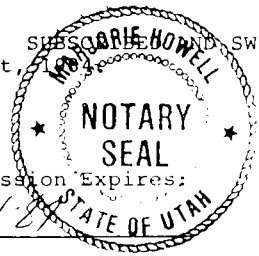
2. Regarding the above-captioned matter, I have never at any time been contacted or requested in any way, manner, shape or form by Daniel Aron Stanton to prepare any transcript in the above-captioned case.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 23rd day of August, 1984.

BYRON RAY CHRISTIANSEN

SUBSCRIBED AND SWORN TO before me this 23 day of August, 1984.



NOTARY PUBLIC
Residing at St. George, Utah

My Commission Expires:
2-4-87

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 1984, I mailed a true and correct copy of the above and foregoing AFFIDAVIT OF BYRON RAY CHRISTIANSEN to D. Aron Stanton at 255 East 400 South, Suite 101, Salt Lake City, Utah, 84111, postage prepaid.

SECRETARY

EXHIBIT A

JUN 1 3 REC'D

THOMPSON, HUGHES & REBER
Michael D. Hughes
Attorney for Plaintiff-Respondent
148 East Tabernacle
St. George, Utah 84770
Telephone: 801/673-4892

IN THE SUPREME COURT OF THE STATE OF UTAH

REBECCA SIMS LORD, Plaintiff,	)	AFFIDAVIT OF ANTHONY THURBER
vs.	)	
DAVID GEORGE LORD, Defendant.	)	No. 19167

STATE OF UTAH)
: ss.
County of Salt Lake)

ANTHONY THURBER, being first duly sworn, hereby deposes and says as follows:

1. I am an attorney licensed to practice law in the State of Utah and have practiced primarily in Salt Lake County for well over fifteen years.

2. This affidavit is based upon my personal knowledge and information.

3. I was the notary public on a deed attached hereto as Exhibit A, and privy to a conversation between the Respondent, Rebecca Sims Lord, and the Appellant, David George Lord, pertaining to the fact that such deed was not

to be filed in the event the parties stayed together for more than one year, which in fact the parties did.

4. I have reviewed the affidavit of Daniel A. Stanton, subscribed and sworn to on the 31st day of May, 1983, and filed with this Court. Paragraph 13 of Mr. Stanton's affidavit states the following:

> On January 18, 1983 witness for plaintiff-respondent, Anthony Thurber, Attorney at Law, called our office and asked about the appeal that was processed to the Supreme Court on the courts order denying defendant-appellants Motion for Change of Venue. Upon an affirmative answer from affiant that the District Court had processed the appeal, Anthony Thurber then stated that he would not appear for trial the following day because he felt the Trial Court did not have jurisdiction to continue with the Trial until the appeal was resolved by the Utah Supreme Court.

5. The above Paragraph 13 of Mr. Stanton's affidavit is not true.

6. On the 18th day of January, 1983, I spoke with Mr. Stanton over the telephone and indicated to him that I was under subpoena to appear in the District Court in and for Washington County in the case of Lord v. Lord, Civil No. 8042. I advised Mr. Stanton that as I was under subpoena I was going down to testify as to the invalidity of the deed attached hereto as Exhibit A, and I suggested to Mr. Stanton that he settle his lawsuit on the best terms possible for his client. Mr. Stanton told me that he intended to appeal, and that he, Mr. Stanton, was not going to attend the trial. At no time did I tell Mr. Stanton that I would not appear for trial on the 19th day of January, and

at no time did I advise Mr. Stanton that I felt the trial Court did not have jurisdiction to hear the matter set before it on the 19th day of January.

7. On the 19th day of January, under subpoena, I was sworn and, upon being ordered to testify by the Court, did so pursuant to the questioning of Michael D. Hughes, attorney for the Plaintiff and Respondent herein, Rebecca Sims Lord.

FURTHER AFFIANT SAITH NOT.

DATED this 6 day of June, 1983.

ANTHONY THURBER
Attorney at Law

SUBSCRIBED AND SWORN TO before me this 10th day of June, 1983.

NOTARY PUBLIC
Residing at Salt Lake County

My Commission Expires:

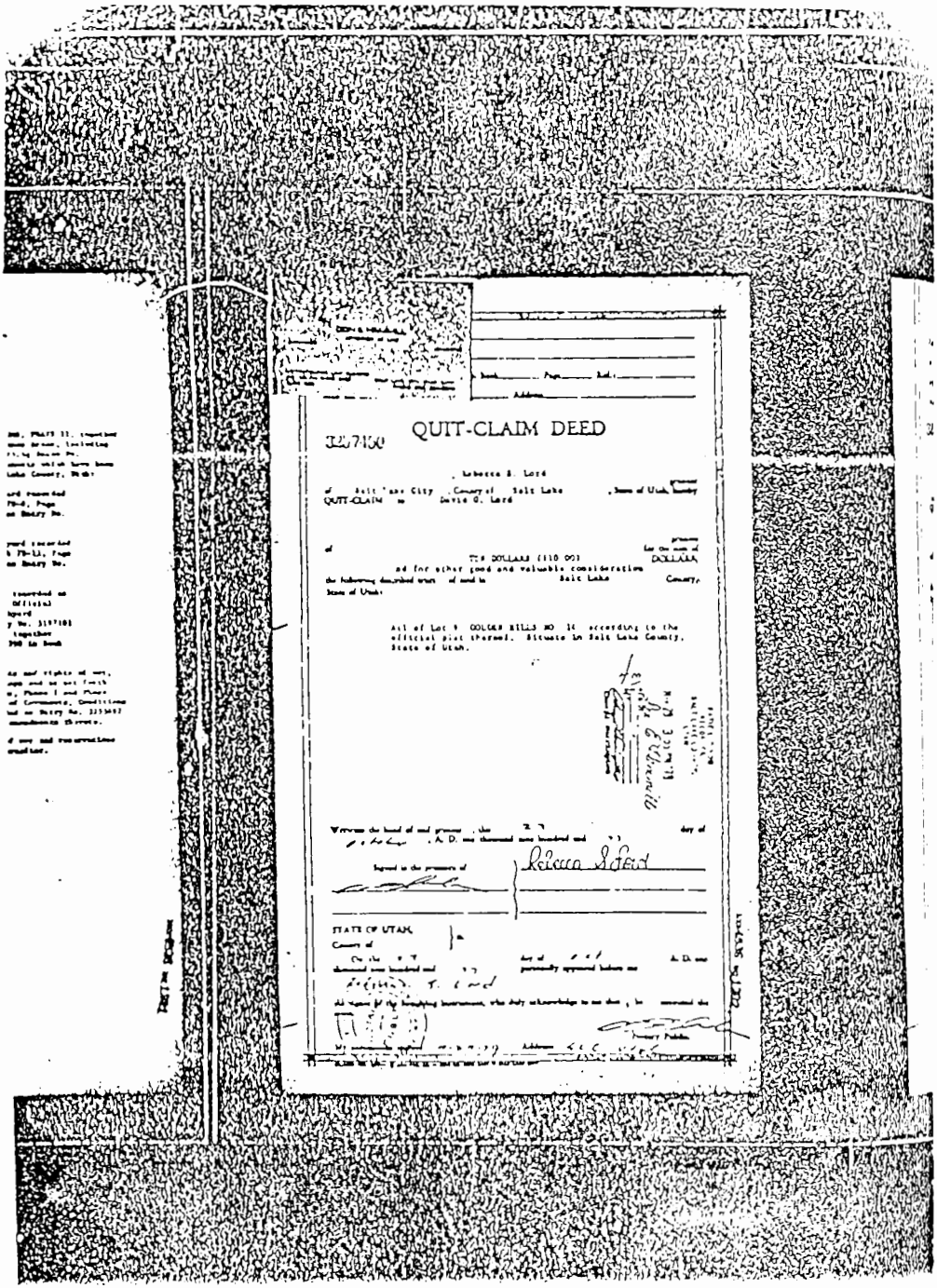
3-27-84

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of June, 1983, I mailed a true and correct copy of the above and foregoing AFFIDAVIT OF ANTHONY THURBER to Attorney for Defendant, Daniel A. Stanton, at 431 South 300 East, Suite 410, Salt Lake City, Utah 84111, postage prepaid.

SECRETARY

EXHIBIT A



QUIT-CLAIM DEED

325716O

Rebecca S. Lord

of Salt Lake City, County of Salt Lake, State of Utah, QUIT-CLAIM to David O. Lord

of

TEN DOLLARS ($10.00)

and for other good and valuable consideration

DOLLARS

the following described tract of land in Salt Lake County, State of Utah:

Lot 9 of Lot 9 GOLDEN HILLS NO. 11, according to the official plat thereof. Situate in Salt Lake County, State of Utah.

Witness the hand of said grantor, this 27 day of

A.D. one thousand nine hundred and

Signed in the presence of

Rebecca S. Lord

STATE OF UTAH,

County of

On the 27 day of

personally appeared before me

A.D. one

thousand nine hundred and

Notary Public.

My commission expires

Address